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Supreme Court, U.S.
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Case No. 03 150 JUL 25 2003

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

PATRICK J. SMITH,
Petitioner,

v.

JAMES V. CROSBY,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. Whether, in considering the effect of a *Bruton* error, a state court of appeal deprives a defendant due process by relying on the "had no effect on the outcome of the trial" harmless error standard rather than standard set forth in *Schneble v. Florida*, 405 U.S. 427, 432 (1972) -- "what seems to us to have been the probable impact [of the *Bruton* error] *on the minds of the average jury*." (emphasis added).

2. Whether an error pursuant to *Bruton v. United States*, 391 U.S. 123 (1968), can be harmless where the only other testimony supporting the prosecution's case was severely impeached on cross-examination and the Petitioner, who testified, maintained his innocence throughout the trial.

B. PARTIES INVOLVED

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Patrick J. Smith, respectfully prays the Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on 27 January 2003 (A-3), rehearing denied on 28 April 2003 (A-1).

D. CITATION TO OPINION BELOW

Smith v. Crosby, 61 Fed. Appx. 670 (11th Cir. 2003).

E. BASIS FOR JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1254(1) to review the final judgment of the United States Court of Appeals for the Eleventh Circuit rendered on 27 January 2003 (A-3), and finalized on 28 April 2003 when rehearing was denied. (A-1).

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Provisions

This case requires interpretation and application of Amendment VI to the Constitution of the United States, which provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him."

2. Statutory Provisions

28 U.S.C. § 2254 (Reproduced in Appendix, A-73).

G. STATEMENT OF THE CASE

1. Course of Proceedings Below.

On 07 December 1996, the Petitioner, Patrick Joseph Smith, a juvenile, was arrested in Okaloosa County, Florida. On 13 January 1997, a two count indictment was returned against Petitioner Smith charging first degree murder with a weapon and robbery with a firearm. (S1-014).[1]

A jury trial took place between 12 January and 16 January 1998. The state court jury returned a verdict of guilty as charged on both counts on 16 January 1998. (S1-124-125). Mr. Smith was sentenced to life in prison without the possibility of parole as to count one and nineteen years and two months in prison on count two. (S2-221-230).

Petitioner Smith took a direct appeal to the Florida District Court of Appeal, First Appellate District, wherein he raised an error pursuant to *Bruton v. United States*, 391 U.S.

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[1] "S" will denote the state court record on appeal with volume and page number.

123 (1968). In a published opinion, *Smith v. State*, 746 So. 2d 1162 (Fla. 1st DCA 1999), the state appellate court held the admission of the redacted statement of the codefendant incriminating Petitioner Smith violated the Confrontation Clause, but the constitutional violation was harmless error. Petitioner Smith sought review of the First District Court of Appeal's decision in the Supreme Court of Florida but the Supreme Court of Florida declined to grant review.

On 5 February 2002, Petitioner Smith filed a petition for federal habeas corpus relief under 28 U.S.C. § 2254. In the petition, Mr. Smith argued that the admission of the "redacted" statement of Harry Tipton, especially in the manner in which it was accomplished,[2] denied him of his right to confront the witnesses against him and denied him a fair trial. Petitioner Smith also alleged that the subsequent affirmance of his

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[2]The state prosecutor in the presence of the jury stated: "Judge, only all the references to [Petitioner] Patrick Smith have been removed." (S6-740). The state court judge stated to the jury, "these are matters in which Patrick Smith's name is mentioned, and we're keeping his name out from your hearing."

conviction by the state appellate court was founded on an unreasonable application of the harmless error standard.

On 17 April 2002, the United States District Court for the Northern District of Florida, Hon. Roger Vinson, denied relief. Petitioner Smith timely sought a certificate of appealability, which was denied by the district court. The Eleventh Circuit Court of Appeals granted a certificate of appealability on the issue of "[w]hether the district court correctly denied [Petitioner Smith's] 28 U.S.C. § 2254 habeas corpus petition." (R1-34).[3]

On 27 January 2003, the Eleventh Circuit Court of Appeals affirmed the denial of Petitioner Smith's habeas petition. *See* Appendix (A-73). The decision was finalized on 28 April 2003 when rehearing was denied. (A-1).

2. Statement of the Facts.

(a) State trial court facts.

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[3]R" will denote the Eleventh Circuit Court of Appeals record on appeal with volume and page number.

In December of 1996, Sean Bradley lived in Niceville, Florida, with David Lawrence and his fiancée, Nicole Darnell, 1996. Mr. Bradley supported himself by selling marijuana. (S4-231). On 03 December 1996, codefendant Harry Tipton entered Mr. Bradley's residence stating he wanted to buy marijuana. (S4-228). Three more young men followed: Robert Wolf (who became a State witness), Chris Kerr, and Petitioner Patrick Smith. (S4-229).

According to Bradley, as the marijuana sale was being discussed, Patrick Smith stood up, pulled out a gun and put it to Mr. Bradley's head saying, "We gonna take your stuff." (S4-233-234). Mr. Bradley replied, "Fine, take it." At that point roommate David Lawrence (who had been sleeping in a back bedroom) appeared from the hallway and began walking towards the kitchen. When Lawrence got between Bradley, Tipton, and Patrick Smith, there was a scuffle and a gun discharged. (R4-235). Harry Tipton was holding the gun. (S4-

235). Mr. Bradley did not see the gun actually fired. (S4-236). The four visitors, Tipton, Wolf, Kerr, and Patrick Smith, left the trailer. (S4-240). The marijuana was gone. (S4-236). Lawrence later died from the gunshot wound.

On cross-examination, Mr. Bradley admitted that he did not tell the whole truth to the sheriff's investigators and that there were a lot of details that he didn't remember. (S4-266). Mr. Bradley further admitted that he had also lied under oath at his deposition about whether there was marijuana inside the house. (S4-273-274). He sought to justify the lie by claiming that his case was still pending, and he did not want to incriminate himself further. (S4-274).

After the incident, Petitioner Smith was interviewed by Investigator Young of the Okaloosa County Sheriff's Department. (S4-353). The interview was tape recorded and the taped statement was subsequently introduced at trial. (S5-521). During the initial interview, Patrick Smith told the

investigator that he was picked up at his home by Harry Tipton, Chris Kerr, and Rob Wolf, and they went looking for some marijuana. The four drove to Niceville and stopped at the Bradley/Lawrence trailer. At the trailer Harry Tipton asked Patrick Smith to hold the gun in case the guys inside were armed. (S4-359-360). Inside the residence, Harry Tipton and Patrick Smith made contact with the occupant of the trailer [Bradley] and began to discuss the purchase of marijuana. At some point, Patrick Smith pulled the firearm from his waistband and attempted to chamber a round. (S4-360). Harry Tipton took the gun away from him. (S4-361).

Subsequently Lawrence came out of the back room and the gun discharged. (S4-362). After the shot, Sean Bradley said, "Go ahead and take it all," referring to the marijuana. (S4-362). During the interview, Patrick Smith stated that Sean Bradley had a revolver next to the couch. (S4-362). Patrick Smith also stated that the group had $120.00 among them to

buy marijuana. (S4-369). According to Investigator Young, Patrick Smith in his first statement to the officers stated that Harry Tipton carried the gun into the trailer and pulled it out and shot the guy who came out of the back bedroom. (S4-370).

At the time of his trial testimony, codefendant Robert Wolf was residing at the Okaloosa County Jail under a sentence of sixteen and a half years' imprisonment. Wolf had pled *nolo contendre* to the charge of manslaughter, armed robbery, and attempted armed robbery as a result of his involvement in the Lawrence shooting. (S5-468-469).

On 03 December 1996, Wolf, Harry Tipton, Christopher Kerr and Patrick Smith went to Niceville where Tipton knew somebody who sold drugs. (S5-472). An alleged robbery plan was discussed in the presence of Patrick Smith. (S5-472). The plan was for Patrick Smith to take the gun in and pull it out. Tipton would grab whatever drugs the guy had, and they would all leave. (S5-474). Once in Niceville, Smith and Tipton went

into the trailer. Smith came to the door and yelled out to Wolf and Kerr if they wanted to buy an ounce. Because that was not according to the plan, both Wolf and Kerr went into the residence. Patrick Smith later pulled out the gun and Harry Tipton took the gun away and fully chambered it. (S5-476-477). At that point, Lawrence came out from the back of the trailer and began to walk towards Harry Tipton saying, "Y'all are going to have to kill me." Lawrence was subsequently shot. (S5-478). The four then ran out of the door. (S5-478).

On cross-examination, Wolf admitted that he had seen a gun between the cushions of the couch next to Mr. Bradley. (S5-497). The butt end of the gun handle was sticking up from the couch. (S5-497).

The testimony of codefendant Harry Tipton (S5-518) was proffered outside the presence of the jury. Mr. Tipton was asked whether or not he was prepared to testify pursuant to the subpoena the State had served on him. Mr. Tipton replied, "No,

sir. I can't honestly say I'd tell the truth. I feel that if I did testify, I'd perjure myself, sir." (S5-519). The court then instructed Mr. Tipton that if he did not agree to testify he may be held in contempt of court. Mr. Tipton responded, "Yes, sir. I do understand and I'm sorry for wasting the court's time, sir." (S5-519). Mr. Tipton steadfastly refused to testify. (S5-520).

The Petitioner, Patrick Smith, testified in his own defense. (S5-548). Patrick Smith was only seventeen years old at the time of the offense. (S5-548). Mr. Smith testified that about 12:30 in the afternoon on 03 December 1996 he was awakened by Harry Tipton, Robert Wolf, and Christopher Kerr. They talked about going and buying some marijuana and getting high. (S5-550). Mr. Smith carried approximately $50.00 to purchase marijuana. The four drove to Niceville, where Harry Tipton said he knew somebody with some marijuana. (S5-556). Once they reached the trailer, Tipton reached under his seat and pulled out a gun. Harry Tipton told Rob [Wolf] to "hold this

just in case the man tries to rob us." Harry said that the man had been known to rob people. Wolf instructed Tipton to take Patrick Smith inside the trailer. (S5-558). Tipton gave the gun to Smith and assured him that the gun was not loaded, and it was just for show in case somebody tried to pull a gun.

Once inside, Tipton whispered to Smith that Bradley had a gun. Smith saw Bradley's gun and thought that Bradley was reaching for it. Petitioner Smith then pulled the gun from his waistband, but was holding it in an awkward manner. Tipton grabbed the gun from him, cocked it, and Tipton pointed it at Bradley. Lawrence then came out of the back bedroom and a shot was fired. Patrick Smith testified that he had no idea a robbery was to take place at the trailer in Niceville. (S5-575).

(b) The *Bruton* issue.

During rebuttal, the State published to the jury a redacted version of a taped statement that codefendant Tipton had given to law enforcement officers on the day of his arrest.

(S6-740). Earlier in the trial, Harry Tipton had refused to testify. (S5-519). Arguing that Mr. Tipton was "unavailable" under section 90.804, Florida Statutes, the State sought to introduce the taped statement under section 90.804(2)(c), as an exception to the hearsay rule, on the grounds the statement was against Mr. Tipton's penal interest. (S6-718).

After argument from counsel, the trial court held that the taped statement could be published to the jury. The court then instructed the jury that they were about the hear a redacted taped statement from Harry Tipton and "it's been sanitized" (S6-739); "[T]he version that you hear is going to only relate to three of the four participants, Tipton, Kerr and Wolf. *The gaps involve other people. Can I make that any clearer?*" (Emphasis added). (S6-740). The prosecutor then commented in the presence of the jury: "Judge, only that all references to Patrick Smith have been removed." (S6-740). The court then informed the jury: "Those are the cause of the gaps. Do you

understand that? *Those are matters in which Patrick Smith's name is mentioned, and we're keeping his name out from your hearing.*" (Emphasis added). (S6-740). The redacted tape was played for the jury and the State announced rest. (S6-740-742, 760). Mr. Tipton's statement, as published for the jury, was as follows:

> We [Tipton and Kerr] woke up around 11:00, 11:30, something like that, because another friend of mine, Robert Wolf, came over, and he said, it's payday. He wanted to go jack somebody, and me and Chris, you know, we didn't have much money or anything on us, so being stupid, we did it, to. We drive around for a while, we talked about it. Rode out there to Niceville, we were up in there, and he showed us the weed, and I pulled out some money, and then his roommate walked out, looked like he just woke up, like mad or something, and he's like – I pointed the gun at him and told him to sit down, and he's like, you're going to have to shoot me, and then I just kept the gun pointed on him, and he walked at me at a fast pace, and as soon as the – he bumped into the gun, it just went off, and I didn't know what to do really. I just looked down. He was still alive. He was on the ground, and then I saw blood just started coming out. I got scared.

Smith, 746 So. 2d at 1167.

(c) Direct Appeal to the District Court of Appeal, First Appellate District of Florida.

On direct appeal, the First District Court of Appeal held that the admission of Tipton's statement violated the Confrontation Clause of the Sixth Amendment. The appellate court additionally held that Tipton's statement was hearsay, was not truly self-inculpatory, and was an attempt to shift blame and curry favor. However, the appellate court concluded that the error was harmless beyond a reasonable doubt:

> Although the admission of Tipton's statement violated the Confrontation Clause of the Sixth Amendment . . . we are convinced beyond a reasonable doubt that the improper admission of the statement was harmless. An extrajudicial statement by a codefendant incriminating the defendant on trial is no longer admissible merely because it interlocks with the defendant's own statement, but it is still proper for an appellate court to consider the interlocking nature of the statements in determining harmless error. Here, the incriminating fact implied in Tipton's statement (that the defendant participated in the robbery) was directly established in defendant's own

> statement. Additionally, the defendant's participation was established by another defendant, Robert Wolf, who testified at trial and was subject to cross-examination, and by forceful circumstantial evidence including Bradley's own testimony that it was the African-American man who forced him at gunpoint to give up the marijuana. For these reasons, we are confident that the error in admitting Tipton's statement had no effect on the outcome of the trial.
>
> In summary, we conclude that Tipton's statement did not qualify as a statement against penal interest and that its admission violated the defendant's rights under the Confrontation Clause. Because Tipton's statement established no more than that which the defendant had conceded in his own statement to investigators, its admission was harmless beyond a reasonable doubt.

Smith, 746 So. 2d 1162, 1170-1171 (Fla. 1st DCA 1999) (citations omitted).

(d) Federal Habeas Corpus Petition under 28 U.S.C. § 2254.

Petitioner Smith raised the issue of the erroneous admission of Tipton's statements in his Petition for Writ of Habeas Corpus By a Person in State Custody on 5 February

2002. The district court adopted the Report and Recommendation of Magistrate Judge Susan M. Novotny and denied relief. (R1-14; RE-35). On appeal, the Eleventh Circuit Court of Appeals affirmed the denial of the writ. (A-3)

H. REASONS FOR GRANTING THE WRIT

1. The Questions Presented are Important.

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with witnesses against him." This concept of confrontation has been a cornerstone of Western society for a number of centuries. The Bible quotes the Roman Governor Festus as saying, "It is not the manner of the Romans to deliver any man up to die before the accused has met his accuser face to face, and has been given a chance to defend himself against the charges." *Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988) (quoting *Acts* 25:16 and a statement made while the Apostle Paul was a prisoner).

In *Bruton*, the Court ruled that a defendant is deprived of his Sixth Amendment right to confrontation when a facially incriminating confession of a nontestifying codefendant is introduced at trial. 391 U.S. at 126. Every court that has reviewed the record in Petitioner Smith's case has agreed that a *Bruton* occurred at trial, meaning that Petitioner Smith was denied his Sixth Amendment right of confrontation. Yet previous courts have held that the *Bruton* error was harmless in Petitioner Smith's case. These conclusions were "contrary to, or involved an unreasonable application of, clearly established federal law." 28 U.S.C. § 2254(d). Moreover, the state appellate court that considered the case on direct appal applied an erroneous test for determining whether the *Bruton* error was harmless. In light of the substantial constitutional right involved and the potential impact that the lower court decisions may have on other cases, Petitioner Smith respectfully requests the Court to grant the petition.

2. The Decision of the Court of Appeals is Erroneous.

(a) The state appellate court misapplied well-established law to the facts of the case.

Finally, Petitioner Smith submits that the state appellate court that considered Mr. Smith's direct appeal applied the improper standard for determining whether the *Bruton* error was harmless. The First District Court of Appeal erroneously relied on the harmless error test set forth in *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). *See Smith*, 746 So. 2d at 1170. The court found that the *Bruton* error was harmless because the error "had no effect on the outcome of the trial." *Smith*, 746 So. 2d at 1171. The *DiGuilio* standard is more onerous than the standard announced by the Court in *Schneble*:

> Having concluded that petitioner's confession was considered by the jury, we must determine on the basis of 'our own reading of the record and on what seems to us to have been the probable impact ... on the minds of an average jury,' whether Snell's admissions were sufficiently prejudicial to petitioner as to require reversal.

405 U.S. at 432 (citations omitted) (emphasis supplied). *See also Vincent v. Parke*, 942 F.2d 989, 992 (6th Cir. 1991) ("We make the determination as to whether the admission of Kinser's [*Bruton*] statement was harmless error on the basis of our own reading of the record and on what seems to us to have been the probable impact . . . on the minds of the average jury.").

Under the appropriate harmless error analysis, however, the state court should have focused instead on whether in the "minds of an average jury," the State's case would have been significantly less persuasive had Tipton's statement been excluded. *See United States v. Hill*, 901 F.2d 880, 884-85 (10th Cir. 1990). By using the wrong standard, the state court's decision was both contrary to and an unreasonable application of *Schneble*. Accordingly, Petitioner Smith respectfully requests the Court to grant his petition and address the proper "harmless error" standard for *Bruton* violations.

(b) The *Bruton* error had a substantial and injurious effect on Petitioner Smith's trial.

The Eleventh Circuit erroneously held that the *Bruton* error in Petitioner's Smith's trial "did not have a substantial and injurious effect or influence in determining the jury's verdict." (A-19-20). However, a review of the record reveals that the state appellate court's decision finding the error harmless was "contrary to, or involved an unreasonable application of, clearly established federal law." 28 U.S.C. § 2254(d).

Petitioner Smith was charged with first-degree felony murder and robbery. The evidence was unrefuted at trial that Petitioner Smith did not fire the gun that caused the victim's death. Therefore, in order for the jury to find Petitioner Smith guilty of felony murder, the State was required to prove that Petitioner Smith was either (1) engaged in the commission of a robbery, (2) attempting to commit a robbery, (3) escaping from the immediate scene of robbery, or (4) a principle to the robbery (i.e., he helped another person or persons commit or attempt to commit the robbery). (S7-880; 888–Jury instructions

regarding the elements of felony murder in Florida). Based on the evidence presented at trial, Petitioner Smith contends that, by focusing on the "minds of an average jury," the State's case would have been significantly less persuasive had codefendant Tipton's statement been excluded. *See Schneble,* 405 U.S. at 432.

In concluding that the *Bruton* error was harmless, the Eleventh Circuit Court of Appeals stated that "[b]oth Wolf and Bradley testified that Smith was carrying the gun" and that "Wolf further testified that Smith was an active participant in the robbery and that he was the one who pulled the gun on the victim, demanding the marijuana." (A-20). A review of the record reveals that the testimony of Wolf and Bradley was impeached when counsel for Petitioner Smith was *afforded the opportunity to cross-examine the witnesses.* Petitioner Smith's case is therefore analogous to *United States v. Pickett*, 746 F.2d 1129, 1133 (6th Cir. 1984), wherein the Sixth Circuit Court of

Appeals stated:

> Having found a *Bruton* violation, we must consider whether the error was harmless. Without the Hill statement, the case against Polsgrove consisted primarily of the testimony of Stevenson, *whose credibility might have been doubted by the jury*. We cannot say that the case against Polsgrove was so overwhelming that the *Bruton* violation was harmless.

(Citations omitted) (emphasis added).

At trial, Petitioner Smith testified that on the day of the alleged incident, he did *not* previously talk with codefendant Tipton about robbing anybody; and that there was no "plan to commit a robbery. He was merely going with codefendant Tipton to purchase some marijuana. (S5-553; 556). Prior to going inside Mr. Bradley's trailer, codefendant Tipton told Petitioner Smith to take a gun inside the trailer "just in case they try to pull a gun" or "just in case the man tries to rob us" because "the man has been known to rob people." (S5-558). Once inside, Petitioner Smith only pulled out his gun in response to Mr. Bradley attempting to grab his gun. (S5-565).

Further, codefendant Tipton was in possession of the gun when Lawrence was shot. Based on Petitioner Smith's testimony, the jury could have reasonably concluded that Petitioner Smith was neither a principal nor an accomplice to the robbery.

In contrast to Petitioner Smith's testimony, codefendant Robert Wolf testified that prior to driving to the crime scene, he and Mr. Tipton had discussed their plan to commit a robbery with Petitioner Smith. (S5-472). The "plan" was that Petitioner Smith would "[p]ull [the gun] out, Harry would grab what the guy had and we'd leave." (S5-474). Despite this alleged "plan," Mr. Wolf admitted that after the men arrived at the crime scene, Petitioner Smith went inside but came back out and asked Mr. Wolf (who did not go inside originally) whether he "want[ed] to buy some weed." (S5-475). After Mr. Wolf entered the residence with Petitioner Smith, Mr. Wolf heard Petitioner Smith attempting to chamber gun, but because he was unable to do so, Harry Tipton took the gun from him. (S5-476).

Mr. Lawrence was shot after Mr. Tipton took the gun from Petitioner Smith. (S5-478).

However, *on cross-examination*, codefendant Wolf stated that he agreed to a plea bargain with the State wherein he plead guilty to manslaughter and would serve a sentence of 16 ½ years in prison. (S5-487). As a condition of that plea bargain, codefendant Wolf agreed to testify against Petitioner Smith. (S5-487). Based on this evidence, the jury could have reasonably concluded that codefendant Wolf implicated Petitioner Smith in the robbery in order to curry favor with State pursuant to his plea bargain. As a result, it would have been reasonable for the jury to completely disregard the testimony of codefendant Wolf, finding such testimony unreliable.

Sean Bradley testified that at some point after men entered his house, "the black man pulled out – cocked a gun

and put the gun in my head."[4] (S4-234). The "black male" then said "We're going to take your stuff." (S4-234). This was the extend of Mr. Bradley's testimony allegedly implicating Petitioner Smith. Moreover, Mr. Bradley testified that when David Lawrence was shot, an "Asian" man was holding the gun. (S4-236).

However, *on cross-examination,* Bradley admitted that he was not truthful when he first met with the investigators from the Sheriff's office regarding the alleged incident. (S4-263). Bradley did not tell the investigators that the men were at his house to buy marijuana because he knew that selling marijuana is illegal, and he did not want to be arrested. (S4-245). Further, Bradley admitted that he had been arrested for possession of marijuana and that he was serving a sentence of three years' probation at the time of the trial. (S4-246).

Merely "carrying a gun" was not enough to establish

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[4]Petitioner Smith was the only "black male" among the group.

felony murder under Florida law. The issue before the jury was whether Petitioner Smith was a participant in the robbery. If Petitioner Smith was simply at the scene of the alleged incident to purchase marijuana, then he could not be convicted of robbery or felony murder. If Bradley attempted to grab a gun, Petitioner Smith would have been justified in reaching for his own gun. The fact that codefendant Tipton later grabbed the gun and shot Mr. Lawrence would not implicate Petitioner Smith in the homicide. Hence, all of the evidence presented by the State linking Petitioner Smith to the robbery was called into question by Petitioner Smith through cross-examination of the witnesses, *with one significant exception*. The prosecution was able to introduce the taped statement of codefendant Tipton, *which prejudicially implicated the involvement of Petitioner Smith in the planning of the robbery.* The reason this evidence was so damaging was that Petitioner Smith was unable to cross-examine codefendant Tipton. Unlike the testimony of Wolf and

Bradley, where Petitioner Smith was able to demonstrate bias and untruthfulness pursuant to cross-examination, Petitioner Smith was not afforded an opportunity to explore any bias or untruthfulness on the part of codefendant Tipton because Petitioner Smith was denied his constitutional right to cross-examine codefendant Tipton.

Codefendant Tipton's statement was particularly damning in this case. As stated by the state appellate court:

> In the original tape recording, Tipton said that all four men were involved in planning the robbery. The edited version was the same in all respects, except that all references to the defendant were deleted.

Smith, 746 So. 2d at 1166. Prior to playing codefendant Tipton's taped statement, the prosecutor stated in front of the jury that "all references to Patrick Smith have been removed," and the trial court added that "[t]hose are the case of the gaps. Do you understand that: those are matters in which Mr. Smith's name is mentioned, and we're keeping his name out from your hearing." (S6-739-740).

Instructing the jury that the redacted portions of the tape specifically referred to Patrick Smith more than defeated the entire purpose behind redacting the statement. It was more prejudicial to Petitioner Smith than if the entire statement had been played, which even the State conceded would be error. (S6-721). The jury was left to speculate what atrocities must have been attributable to Petitioner Smith. The jury was left to its own devices and its own imagination. Instead of being protected by the redaction, Petitioner Smith was harmed by the pauses, during which the jury was free to write its own script. Most importantly, Petitioner Smith denied the opportunity to cross-examine his accuser.

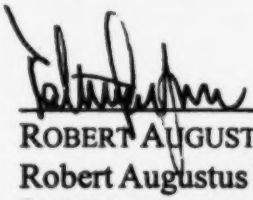
Petitioner Smith was denied a right which is a cornerstone of this great nation's criminal justice system – the right to confront his accuser. Codefendant Tipton's statement may have been precisely the evidence that convinced the jury that Patrick Smith was a participant in the robbery and felony

murder. The statement was the last piece of evidence that the jury heard before it retired to consider its verdict. Therefore, the admission of codefendant Tipton's statement had a substantial and injurious influence in determining the jury's verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

I. CONCLUSION

Petitioner Smith respectfully requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,



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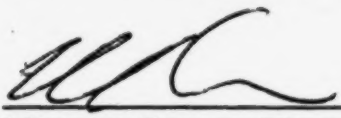

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COUNSEL FOR PETITIONER

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

PATRICK J. SMITH,
Petitioner,

v.

JAMES V. CROSBY,
Respondent.

Appendix to
Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-12542 BB

PATRICK J. SMITH,

Petitioner-Appellant,

versus

JAMES CROSBY,

Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Florida

---

BEFORE: ANDERSON, BIRCH AND BLACK, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Patrick J. Smith, is DENIED.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR. 28 2003
THOMAS K. KAHN
CLERK
[Conformed]

ENTERED FOR THE COURT:

/s/ Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-12542
Non-Argument Calendar

D.C. Docket No. 01-00018-CV-3-RV

PATRICK J. SMITH,

Petitioner-Appellant,

versus

JAMES CROSBY,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Florida

---

(January 27, 2003)

Before ANDERSON, BIRCH and BLACK, Circuit Judges.

PER CURIAM:

Patrick J. Smith, a Florida state prisoner, imprisoned

following his 1998 convictions for first degree murder and two counts of armed robbery with a firearm, filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, arguing that his convictions were obtained in violation of the Confrontation Clause of the Sixth Amendment. Smith filed his petition after 24 April 1996; therefore, the Antiterrorism and Effective Death Penalty Act of 1996 ["AEDPA"], Pub. L. No. 104-132, 110 Stat. 1214 (1996), governs his appeal. Because Smith has failed to demonstrate that Florida's First District Court of Appeals's decision that the error at trial was harmless was contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court, we AFFIRM.

I. BACKGROUND

Smith, imprisoned following his 1998 convictions for first degree murder and two counts of armed robbery with a firearm, filed this petition for writ of habeas corpus pursuant 28

U.S.C. § 2254, arguing that his convictions were obtained in violation of the Confrontation Clause. R1-1 at 76. Specifically, Smith argued that the trial court's admission of the redacted statement of Harry Tipton, Smith's codefendant, who refused to testify at trial, denied Smith his right to confront the witnesses against him and his right to a fair trial. Smith contended that the Florida First District Court of Appeals's ("DCA") affirmance of his conviction was founded on an unreasonable application of the harmless error standard. He asserted that both the trial court and appellate court's decisions were contrary to, or involved an unreasonable application of, clear established federal law as determined by the Supreme Court. Id. at 7-9. Smith argued that he was harmed by the admission of the taped statement because the prosecutor and the judge told the jury that the redacted portions of the tape specifically referred to Smith, and the jury was left to imagine what "atrocities were attributable to Mr. Smith." R1-8 at 18-19.

He asserted that his Sixth Amendment rights were also violated because he was not permitted to cross-examine the prosecutor and the trial judge, who both "testified" during trial that he was a participant in the robbery and was involved in the conduct on the tape. Id. at 19. He also argued that the DCA incorrectly focused on the interlocking nature of the evidence and applied an incorrect harmless error test, and should have instead asked whether the state's case would have been significantly less persuasive had the recorded statement been excluded. Id. at 21-24.

A review of the record reveals that Smith's convictions stemmed from his participation with three other men in an armed robbery at a mobile home that led to the death of David Lawrence, one of the occupants of the mobile home. Smith initially informed the police that Tipton, one of the other participants, had been the person holding the gun. Upon learning that Sean Bradley, the robbery victim, told police that

it was an African-American man who held the gun on him – Smith was the only African-American present – Smith confessed that he had taken the gun into the house at Tipton's request. Smith stated that Tipton had instructed him to pull the gun out when the marijuana was displayed, and that the gun might be needed because the people in the mobile home might be armed. He admitted that, as per Tipton's instructions, he pulled the gun out and pointed it at the victim, but because he did not know how to operate the gun, Tipton took it from him. R1-9 at Exh. A at 2-4.

Having entered a plea of no contest, codefendant Robert Wolf testified that Smith was an active participant in the robbery. Wolf stated that Smith carried the gun into the mobile home, pulled it on the victim, and demanded the marijuana, but that Tipton was the one who shot Lawrence. R1-9 at Exh. A at 4-5.

Smith testified at trial that he had only planned with

Tipton to purchase a small amount of marijuana and knew nothing about the robbery plan. He stated that when they arrived at the victim's home, Tipton handed him the gun and told him that it was not loaded, but that he should hold it just in case the victim tried to rob them. Id. at 6. The state also called Tipton as a witness, but he refused to testify. However, after Smith testified, the state sought to introduce a redacted version of Tipton's pretrial statement to the sheriff's investigator to rebut Smith's claims. Smith objected to the tape as hearsay and because its admission would violate his right to confront the witnesses against him. The trial court admitted the statement. Id. at 7.

In his unredacted statement, Tipton stated that he, Wolf, Smith, and a fourth man, Chris Kerr, planned the robbery. Although all references to Smith were redacted from the tape, as the DCA would later conclude, the tape was presented to the jury in a manner that made it obvious that the missing portions

of the tape implicated Smith as a participant in planning the robbery. References to Smith's carrying the gun into the mobile home and pointing it at Bradley were also redacted. In the redacted statement, Tipton acknowledged that he pointed the gun at the victim, and that the gun accidently discharged because the victim charged into him and bumped the gun. Id. at 5-7, 9.

Before Tipton's taped statement was played for the jury, the trial court gave the following instruction:

> Ladies and gentlemen, as you gleaned from the testimony of Investigator Young, you're getting ready to hear a tape of a statement made by Harry Tipton, and as you've learned, it's what [the government] and Investigator Young call a redacted tape. That means it's been sanitized. There are parts of it that are gone. There are gaps in there. It'll sound to you as an incomplete – it's very short, and it's incomplete, but the portions that you will hear are true and correct and accurate as to those portions actually played. You'll hear Mr. Tipton speaking and making his statement. You'll hear references to persons that you already heard about, persons by the name of Kerr and Wolf. So the version that you hear is going to only relate to three of the

> four participants, Tipton, Kerr and Wolf. The gaps involve other people. Can I make that any clearer?

The prosecutor then stated, "Judge, only that all references to Patrick Smith have been removed." The judge then instructed the jury, "Those are the cause of the gaps. Do you understand that? Those are matters in which Mr. Smith's name is mentioned, and we're keeping his name out from your hearing." The court then asked defense counsel, "Mr. Flowers, can I make it any more clear?" Defense counsel responded, "No, Your Honor." Id. at 8.

On direct appeal, Smith argued, inter alia, that the trial court erred in admitting Tipton's pretrial statement. R1-9 at Exh. B, Initial Brief of Appellant at 1-6. The DCA affirmed Smith's convictions and sentences. Smith v. State, 746 So.2d 1162 (Fla. Dist. Ct. App. 1999). The DCA found that Tipton's statement was inadmissible hearsay, and that its presentment into evidence violated the Confrontation Clause of the Sixth

Amendment because it was obvious that the passages deleted from the tape recording were incriminating references to Smith. R1-9 at Exh. A at 9-17. The court specifically determined that the prosecutor and the trial court's statements that the gaps were references to Smith allowed for an inference that "Tipton had incriminated the defendant." Id. at 16. However, the court held that it was convinced "beyond a reasonable doubt" that the tape's admission was harmless. Id. at 17. The DCA held that it was "confident that the error in admitting Tipton's statement had no effect on the outcome of the trial," given the interlocking nature of the confession and the other evidence presented at trial, i.e., Smith, Wolf, and Bradley's testimonies. Id. at 17-18. The DCA noted that although a codefendant's confession was not admissible merely because it interlocked with the defendant's own statement, it was proper for the court to consider the interlocking nature of the statements in determining harmless error. Id. The DCA cited State v.

Deguilio, 491 So. 2d 1129 (Fla. 1986), a case in which the Florida Supreme Court stated that Florida's harmless error standard was consistent with the harmless error test set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967). Id.

The magistrate judge issued a report and recommendation ("R & R") that Smith was not entitled to federal habeas relief. The magistrate judge determined that the DCA's denial of Smith's claims was not unreasonable under federal law, and that the admission of Tipton's testimony was not so substantial and injurious as to have cast doubt upon the jury's verdict. He noted, as did the DCA, that the in-court testimony of Bradley and Wolf had implicated Smith in the robbery and in the felony murder plans. R1-12 at 8-9.

Smith filed objections to the R & R. R1-13. Smith correctly maintained that the AEDPA controlled his appeal, and argued that the DCA's finding of harmless error was contrary to and an unreasonable application of federal law because the

DCA applied a stricter harmless error standard than required under federal law. Id. at 3-7.

The district court adopted the R & R, and denied Smith's habeas petition. R1-14. Smith filed a motion for a certificate of appealability ("COA"), arguing that the error at trial was not harmless, and that he had made a substantial showing of a denial of a constitutional right. R1-16. The district court denied the motion for COA, finding that Smith had not made a substantial showing of the denial of a constitutional right, based on the reasons set forth in the magistrate judge's R & R. R1-27. We granted COA on the issued of "[w]hether the district court correctly denied appellant's 28 U.S.C § 2254 habeas corpus petition." R1-34.

II. DISCUSSION

A. Petitioner's Claims

Smith argues that the DCA's decision was contrary to and an unreasonable application of clearly established federal

law. Smith asserts that the conduct of the prosecutor and the trial court in stating that the redacted portions of the tape specifically referred to Smith defeated the purpose behind redacting the statement and violated his rights under the Confrontation Clause of the Sixth Amendment. Smith also contends that, in determining that the trial error was harmless, the DCA improperly focused on whether the error had an effect on the outcome of trial, but should have focused instead on whether, in the minds of the average juror, the state's case would have been significantly less persuasive had the taped statement been excluded. Thus, Smith argues, the DCA applied a harmless error standard stricter than that used by the Supreme Court. Smith asserts that the DCA also improperly determined that Tipton and Smith's statements were interlocked in all material respects and that, as such, admission of Tipton's statement was not harmless. He also contends that Tipton's statement was not harmless because it rebutted a key element in

the defense's theory of the case; that the robbery was not planned. He insists that Tipton's statement was the strongest pieced of evidence against him, and that without the statement there was insufficient evidence implicating him. Smith claims that the federal district court, although acknowledging the appropriate standard of review as set forth in Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710 (1993), considered factors relevant to a pre-Brecht harmless-beyond-a-reasonable-doubt assessment and did not address the effect of the Confrontation Clause error on the jury. Finally, Smith argues that the prosecutor's remark essentially stating that the gaps in the tape made reference to Smith was improper. He asserts that the trial court failed to give a curative instruction, but instead solidified the conclusion that he was involved in a planned robbery.

B. Pertinent Law

Because Smith's petition was filed after 24 April 1996,

and is, therefore, governed by the provisions of the AEDPA, in order for him to obtain habeas relief, he must demonstrate that the state court's ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court . . . or was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2); Williams v. Taylor, 529 U.S. 362, 402-03, 120 S. Ct. 1495, 1518 (2000). A state-court decision is contrary to clearly established federal law if (1) the state court "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or (2) "the state court confronts facts "materially indistinguishable" from relevant Supreme Court precedent," but reaches an opposite result. Williams, 529 U.S. at 405, 120 S. Ct. at 1519. An unreasonable application of clearly established federal law is one in which the "state court identifies the correct governing legal rule from [the Supreme]

Court's cases, but unreasonably applies" that principle to the facts of the petitioner's case, or "either unreasonable extends a legal principle from [the Supreme Court's decisions] to a new context where it should not apply, or unreasonable refuses to extend that principle to a new context where it should apply." Id. at 407, 120 S. Ct. at 1520.

The Supreme Court has held that some constitutional errors are so unimportant and insignificant that they may be deemed harmless, and will not require the automatic reversal of the conviction. Chapman, 386 U.S. at 22, 87 S. Ct. at 827. On direct review, for a constitutional error to be deemed harmless, the court must find the error harmless beyond a reasonable doubt. Id. at 24, 87 S. Ct. at 828. This harmless error standard announced in Chapman, however, does not apply on collateral review. To warrant federal habeas corpus relief, constitutional violations occurring at trial must have "ha[d a] substantial and injurious effect or influence in determining the jury's verdict."

Brecht, 507 U.S. at 637, 113 S. Ct. at 1722 (quoting Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)) (internal quotation omitted). The harmless error standard applied on collateral review is "*less* onerous" than on direct appeal. Id. (emphasis added). To meet this test, a habeas petitioner alleging constitutional trial error must establish actual prejudice. Id. at 621. Where there is "grave doubt" in a habeas proceeding as to "whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless." O'Neal v. McAninch, 513 U.S. 432, 436, 115 S.Ct. 992, 994 (1995).

The Confrontation Clause provides that a criminal defendant shall have the right to confront the witnesses against him. U.S. Const. amend. VI. This guarantee, made applicable to state prosecutions through the Fourteenth Amendment, includes the right to cross-examine witnesses. Cruz v. New York, 481 U.S. 186, 189, 107 S.CT. 1714, 1717 (1987). A

defendant is deprived of his rights under the Confrontation Clause when his codefendant's incriminating confession is introduced at their joint trial, and he is unable to cross-examine his codefendant. Bruton v. United States, 391 U.S. 123, 127-28, 88 S.Ct. 1620, 1623 (1968). It is possible to avoid a Bruton violation by redacting all references to the defendant from the codefendant's statement. Richardson v. Marsh, 481 U.S. 200, 209, 107 S.Ct. 1702, 1708 (1987). However, the redactions of the defendant's name from the codefendant's statement will not cure a Bruton violation if the jury could infer that the codefendant incriminated the defendant in the original version of the statement. Gray v. Maryland, 523 U.S. 185, 194, 118 S.Ct. 1151, 1156 (1998). Accordingly, there was Bruton error at Smith's trial because the redacted portions of the statement directly implicated Smith.

In light of the record as a whole, however, the district court was correct that the trial court's improper admission of

Tipton's redacted statement did not have a substantial and injurious effect or influence in determining the jury's verdict. Thus, the error was harmless. Both Wolf and Bradley testified that Smith was carrying the gun. Wolf further testified that Smith was an active participant in the robbery and that he was the one who pulled the gun on the victim, demanding the marijuana. See R1-9 at Exh. A at 2-5. The Chapman harmless error standard applied by the DCA was appropriate on direct review. See Brecht, 507 U.S. at 636-38, 113 S.Ct. at 1721-22. Thus, the DCA's denial of Smith's claim was not unreasonable under federal law.

Finally, Smith's claim of prosecutorial misconduct was not raised below in Florida state court and is, therefore, not properly before the district court. Before bringing a habeas action in federal court, a state prisoner must exhaust all state court remedies that are available for challenging his conviction. 28 U.S.C. § 2254(b)(1)(A), (c). To exhaust state remedies, the

state prisoner must "fairly present" every issue raised in his federal petition to the state courts. Castille v. Peoples, 489 U.S. 346, 351, 109 S. Ct. 1056, 1060 (1989). Thus, the prosecutorial misconduct claim has not been exhausted, and, if now presented to the Florida courts, would be procedurally barred. Since Smith cannot demonstrate cause and prejudice or a fundamental miscarriage of justice to excuse his untimely claim, it is procedurally defaulted. See Isaacs v. Head, 300 F.3d 1232 (11th Cir. 2002).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PATRICK J. SMITH II,

Petitioner,

vs. 3:01cv18/RV/SMN

MICHAEL W. MOORE,

Respondent.
_____/

ORDER

This cause comes on for consideration upon the magistrate judge's report and recommendation. All parties previously have been furnished copies of the report and recommendation and have been afforded an opportunity to file objections. Pursuant to Title 28, United States Code, Section 636(b)(1). I have made a de novo determination of those portions to which an objection has been made.

Having considered the report and recommendation and all objections thereto timely filed by the parties, I have

determined that the report and recommendation should be adopted.

Accordingly, it is now ORDERED as follows:

1. The magistrate judge's report and recommendation is adopted and incorporated by reference in this order.

2. The petitioner for writ of habeas corpus is DENIED.

DONE AND ORDERED this 17 day of April, 2002.

/s/ Roger Vinson
ROGER VINSON
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PATRICK J. SMITH II,

Petitioner,

vs. 3:01cv18/RV/SMN

MICHAEL W. MOORE,

Respondent.
_____/

REPORT AND RECOMMENDATION

This cause is before the court on a petition for writ of habeas corpus raised under 28 U.S.C. § 2254 (doc. 1) and response thereto (doc. 9). Petitioner has filed a reply to the response (doc. 11).

Petitioner is a Florida inmate incarcerated in Okaloosa Correctional Institution. Following a jury trial, on March 16, 1998, petitioner was sentenced in the Circuit Court in and for Okaloosa County to life imprisonment upon charges of first degree felony murder, and concurrently to 230 months on

charges of robbery with a firearm.

In this federal habeas action, petitioner challenges on Sixth Amendment grounds the admission into evidence of the pretrial confession of a codefendant who had refused to testify at trial and was therefore not subject to cross-examination. Respondent concedes that this claim was properly exhausted in the state courts.

STANDARD OF REVIEW

Under federal habeas review, a state prisoner may obtain relief on a claim adjudicated on the merits in state court if the state court decision was either (1) contrary to clearly established federal law as determined by the Supreme Court of the United States, or (2) involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d) (as amended in 1996 by part of the Antiterrorism and Effective Death Penalty Act). Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d

389 (2000); see also Helton v. Secretary for Dept. Of Corrections, 233 F.3d 1322, 1326 (11th Cir. 2000). With regard to the latter, an "objective reasonableness" standard applies. Williams, supra; McIntyre v. Williams, 216 F.3d 1254 & n.4 (11th Cir. 2000).

As emphasized in Williams,

> a federal court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

529 U.S. at 411, 120 S.Ct. at 1522. Deference is therefore afforded to state court determinations that are not unreasonable applications of federal law.

Finally, state court findings of historical fact made in the course of evaluating a claim are entitled to a presumption of correctness upon federal habeas review and will be overturned only if found to be objectively unreasonable by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); see also Mincey

v. Head, 206 F.3d 1106, 1130 n.58 (11th Cir. 2000).

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner was charged with armed robbery and first degree felony murder in connection with his alleged participation with three other men in an armed robbery at a mobile home that led to the death of one of the occupants. The facts of the case are more thoroughly summarized in the state appellate court's opinion. See Smith v. State, 746 So. 2d 1162 (Fla. 1st DCA 2000).

According to the testimony of the victim of the robbery, Sean Bradley, as the four men were inspecting marijuana for sale, petitioner [whom Bradley identified as "the African-American man," petitioner being the only one of the four men who was African American] pulled out a gun, pointed it a Bradley, and informed him that they were going to take the marijuana from Bradley. David Lawrence, who also lived in the mobile home, then entered the room, and after words were

exchanged between Lawrence and one of the men, Lawrence was shot. Although petitioner had been holding the gun, Bradley did not see who fired the gun, and after the shot was fired, Bradley observed that another of the four men, Harry Tipton, was holding the gun. The four men subsequently left, and Bradley noticed that the marijuana was missing. Lawrence eventually died from the gunshot.

While Petitioner had initially informed the police that Tipton had possession of the gun during the entire incident, upon learning of Bradley's statement, he confessed that the had taken the gun into the house at Tipton's request. According to Petitioner's confession, Tipton had instructed him to pu7ll the gun out when the marijuana was displayed. Tipton also stated that the gun might be needed because the people inside might be armed. As instructed, petitioner pulled the gun out and pointed it at Bradley, but because petitioner did not know how to operate the gun, Tipton took the gun from him. When

Lawrence entered the room, Tipton shot him. Another of the four men, Robert Wolf, grabbed the marijuana, and then all four men left. Petitioner later revised his statement to say that Bradley was armed and that Petitioner pulled out Tipton's gun when Bradley was reaching for his own gun.

Petitioner testified at trial in his own defense, stating that he had only planned, with Tipton, to purchase a small amount (that is, a misdemeanor amount) of marijuana and knew nothing about the robbery plan. When the four men arrived at Bradley's house, Tipton handed petitioner a gun, telling him that it was not loaded but to hold it in case Bradley tried to rob them. Petitioner concealed the gun in his pants and pulled it out during the drug transaction when Tipton told him that Bradley had a gun and when Bradley started to reach for his gun. Petitioner then told Bradley to drop the marijuana because he was afraid Bradley would throw it at him, get his own gun and shoot petitioner. As petitioner had earlier stated, because he

was unable to operate the gun, Tipton took the gun from him and shot Lawrence when Lawrence enter5ed the room and the two exchanged words. Petitioner testified that he then ran from the house and had no further contact with any of the men, and did not know that the marijuana had been taken from the house. Thus, petitioner's defense theory was that he intended only to purchase a misdemeanor amount of marijuana and therefore the state could not satisfy the required elements of robbery and felony murder.

Having entered a plea of no contest, codefendant Wolf testified that petitioner was an active participant in the robbery. Wolf stated that petitioner carried the gun into the mobile home, pulled it on Bradley, and demanded the marijuana but that Tipton was the one who shot Lawrence. Wolf stated that after the shooting he took the marijuana and that all four drove away together, smoked the marijuana, and later disposed of the

gun.[5]

Because Tipton refused to testify, his tape recorded pretrial statement was admitted into evidence over petitioner's objection. In this statement, Tipton stated that he, Wolf, and the fourth man, Chris Kerr, planned the robbery. Although all references to petitioner were redacted from the tape, as the state appellate court would later conclude, the tape was presented to the jury in a manner that made it obvious that the mission portions of the tape implemented petitioner as a participant in planning the robbery. See Smith, 746 So. 2d at 1170. References to petitioner's carrying the gun into the mobile home and pointing it at Bradley were also redacted. Tipton acknowledged that he pointed the gun at Lawrence and further stated that the gun accidently discharged because Lawrence

---

[5]The gun was later found in a location specified by Wolf and introduced into evidence at trial.

charged into him and bumped the gun.[6]

STATE COURT REVIEW OF CLAIM

In reviewing petitioner's claim on direct appeal, the state appellant court found that the admission of codefendant Tipton's confession violated the Confrontation Clause of the Sixth Amendment and state hearsay rules. See id. at 1167-70. However, the court was "convinced beyond a reasonable doubt

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[6]Tipton's entire statement, as heard by the jury, was as follows: Yes. I met some people a couple of months ago, I believe, and my friends went up there and bought, like, a half ounce off of him. I met them at this time. I went there once after that to get a sack, and they didn't have none, and he remembered me, and I just left and didn't think of nothing of it, and the morning of the shooting, Tuesday morning, a friend, Chris Kerr, came over and woke me up. He came in, and we just fell back asleep. We woke up around 11:00, 11:30, something like that, because another friend of mine, Robert Wolf, came over, and he said, it's payday. He wanted to go jack somebody, and me and Chris, you know, we didn't have much money or anything on us, so, being stupid, we did it, too. We drove around for a while, we talked about it. Rode out there to Niceville. We were up in there, and he showed us the week, and I pulled out some money, and then his roommate walked out, looked like he just woke up, like mad or something, and he's like – I pointed the gun at him and told him to sit down, and he's like, you're going to have to shoot me, and then I just kept the gun pointed on him, and he walked at me at a fact pace, and as soon as the – he bumped into the gun. It just went off, and I didn't know what to do really. I just looked down. He was still alive. He was on the ground, and then I saw blood just started coming out. I got scared.

Smith, 746 So. 2d at 1167

that the improper admission of the statement was harmless." Id. at 1170. In so holding, the court stated that the fact that Tipton's statement "interlocked"[7] with petitioner's own admission could be considered under harmless error analysis, and it went on to determine:

> [T]he incriminating fact implied in Tipton's statement (that [petitioner] participated in the robbery) was directly established in [petitioner's] own statement. Additionally, [petitioner's] participation was established by another defendant, Robert Wolf, who testified at trial and was subject to cross-examination, and by forceful circumstantial evidence including Bradley's testimony that it was the African-American man who forced him at gunpoint to give up the marijuana. For these reasons, we are confident that the error in admitting Tipton's statement had no effect on the outcome of the trial.

Id. at 1171.

LEGAL STANDARDS

---

[7]A codefendant's confession "interlocks" with the defendant's if the codefendant's confession is "substantially the same as and consistent with [the other] confession with respect to all elements of the crime and did not threaten to incriminate [the defendant] any more than [the defendant's] own confession." Cruz v. New York, 481 U.S. 186, 195, 107 S.Ct. 1714, 1720, 95 L.Ed2d 162 (1987) (White, J., dissenting).

The admission at trial of the confession of a codefendant who is not subject to cross-examination violates the confrontation clause of the Sixth Amendment. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Where there is no confession from the defendant himself, the codefendant's confession is so "devastating" that a curative instruction to the jury will not suffice. Id. at 135-36, 88 S.Ct. At 1627-28. In cases where the defendant has also confessed, admission of a codefendant's confession will still violate the Sixth Amendment, and the fact that the codefendant's confession "interlocks" with the defendant's confession does not make the codefendant's confession any less "devastating" to the defense. Cruz v. New York, 481 U.S. 186, 191-93, 107 S.Ct. 1714, 1718-19, 95 L.Ed.2d 162 (1987). "[W]hat the "interlocking" nature of the codefendant's confession pertains to is not its harmfulness but rather its reliability: If it confirms essentially the same facts as the

defendant's own confession it is more likely to be true." Id. at 192, 107, S.Ct. At 1719.

However, the Supreme Court has consistently held that violations of the Confrontation Clause are subject to harmless error analysis, and in this regard courts should consider the defendant's own confession and its relation to the codefendant's confession, whether interlocking or not. Id. at 192, 107 S.Ct. at 1719; Brown v. United States, 411 U.S. 223, 231, 93 S.Ct. 1565, 1570, 36 L.Ed.2d 208 (1973); Schneble v. Florida, 405 U.S. 427, 428, 92 S.Ct. 1056, 1058 32 L.Ed.2d 340 (1972); Harrington v. California, 395, U.S. 250, 253, 89 S.Ct. 1726, 1728, 23 L.Ed.2d 284 (1969); United States v. Petit, 841 F.2d 1546, 1556 (11th Cir.), cert. denied, 487 U.S. 1237, 108 S.Ct. 2906, 101 L.Ed.2d 938 (1988). Particularly where the violative testimony is cumulative of other, similar testimony, the error is likely to be harmless. Brown, Schneble, and Harrington, supra.

On federal habeas review, constitutional violations

occurring at trial are reviewed for error under a stricter standard than those under direct review. To warrant relief, the state court's error must have "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993). Unless this court has "grave doubt" about whether the error was harmless, habeas relief should not be granted. O'Neal v. McAninch, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).

Petitioner asserts that this court should review the state court's ruling that the Sixth Amendment violation was harmless under the less demanding "harmless beyond a reasonable doubt" standard as established for cases under direct review by Chapman v. California, 386 U.S. 18, 24, 87, S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). This court would then have to determine under the AEDPA whether the state appellate court reasonably applied the Chapman standard in reaching its decision.

However, the Eleventh Circuit has uniformly applied the Brecht standard under federal habeas review when determining the harmlessness of state court errors in post-AEDPA cases. See Fugate v. Head, 261, F.3d 1206 (11th Cir. 2001); McIntyre v. Williams, 216 F.3d 1254, 1258 (11th Cir. 2000); see also Penry v. Johnson, 532 U.S. 782, 121 S.Ct. 1910, 1919-20, 150 L.Ed.2d 9 (2001) (while not addressing whether Brecht governs federal habeas review of state court harmless error analysis, implementing Brecht analysis); Bains v. Cambra, 204 F.3d 964, 977 (9th Cir. 2000); Gilliam v. Mitchell, 179 F.3d 990, 995 (6th Cir. 1999). If the error is not harmless under Brecht, then it will surely be true that the state court's application of Chapman was not unreasonable. Bulls v. Jones, 274 F.3d 329, 334 (6th Cir. 2001).

Petitioner also asserts that the state appellate court erred by simply determining that "the error in admitting Tipton's statement had no effect on the outcome of trial," indicating that

the court may thereby have used a lesser standard than required. However, it seems clear that a finding of "no effect" n only meets but exceeds either the Brecht or the Chapman standard. Furthermore, petitioner overlooks the fact that the state court also used the Chapman "beyond a reasonable doubt" language in its discussion and cited State v. DiGuilio, 490 So. 2d 1129. 1134 & n.9 (Fla. 1986), which stated that Florida's harmless error statute is consistent with Chapman, Smith, 746 So. 2d at 1170.

DISCUSSION

Petitioner contends that the state court unreasonably found the error to be harmless because the confessions were interlocking. Indeed, there has been much written by the Supreme Court about whether an interlocking confession is more or less harmful to the defendant's case. Compare Cruz, 481 U.S. at 192, 107 S.Ct. at 1718 ("A codefendant's confession will be relatively harmless if the incriminating story

it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession") with Parker v. Randolph, 442 U.S. 62, 79, 99 S.Ct. 2132, 2142, 60 L.Ed2d 713 (1979) (Blackmun, J., concurring in part and concurring in the judgment) ("in most interlocking-confession cases, any error in admitting the confession of a nontestifying codefendant will be harmless beyond a reasonable doubt"). Petitioner, of course, argues that the interlocking nature of Tipton's and petitioner's confessions caused the utmost damage to petitioner's defense because petitioner was unable to "distance himself" from Tipton's statement. Petitioner additionally argues that, to the extent Tipton's statement did not interlock with petitioner's, particularly where Tipton indicated that all four men helped plan the robbery,[1] it caused further damage to the defense. While this may be true, it is equally true

[1]Of course, because of the redaction and the prefatory remarks about the tape in court, petitioner was only impliedly named as a participant.

that petitioner's pretrial statements caused much of the same damage.[9] More importantly, petitioner utterly fails to answer to the fact that, as the state appellate court found, he was surely implicated in the robbery and in the felony murder by the in-court testimony of both Bradley and codefendant Wolf, and that Wolf implicated petitioner in the robbery plans.

Upon review of the record, this court cannot say that the admission of Tipton's testimony was so "substantial and injurious" as to have cast doubt upon the jury's verdict. Brecht, supra. This court does not have grave doubt as to the harmlessness of the error. O'Neal, supra. Because the state appellate court's denial of petitioner's claim was therefore not unreasonable under Supreme Court law, federal habeas relief should be denied.

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[9]Petitioner argues that his pretrial statement does not reflect that he planned to commit a robbery, but this court concludes from its review of the statement that an inference could be made that petitioner had in fact planned to commit robbery along with the other three men as long as the circumstances were favorable. See doc. 11, ex. A at 3. Furthermore, petitioner fails to show how any alleged failure to pre-plan the robbery before their meeting with Bradley would have exonerated him from the charges.

CONCLUSION

For the reasons discussed herein, the undersigned finds that petitioner has failed to demonstrate his clams entitle him to federal habeas relief.

Accordingly, it is respectfully recommended:

1. That the petition for writ of habeas corpus be DENIED and the clerk directed to close this case.

At Pensacola, Florida, this 26th day of March, 2002.

/s/ Susan M. Novotny
Susan M. Novotny
United States Magistrate Judge

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations may be filed within ten days after being served a copy thereof. A copy of objects shall be served upon the magistrate judge and all other parties. Failure to object may limit the scope of appellate review of factual findings. See 28 U.S.C. § 636; United States v. Roberts, 858 F.2d 698, 701 (11th Cir. 1988).

Supreme Court of Florida

FRIDAY, JUNE 2, 2000

CASE NO.: SC00-277
Lower Tribunal No.: 1D98-1315

PATRICK JOSEPH SMITH, II vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

SHAW, WELLS, ANSTEAD, PARIENTE and QUINCE, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall SEAL
Thomas D. Hall
Clerk, Supreme Court

bh
Served:

HON. JON S. WHEELER, CLERK
ROBERT AUGUSTUS HARPER, JR.
STEVEN B. WHITTINGTON
BART SCHNEIDER
JAMES W. ROGERS
HON. JACK R. HEFLIN, JUDGE
HON. NEWMAN C. BRACKIN, CLERK

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

PATRICK JOSEPH SMITH, II,

Appellant,

v. Case No. 98-1315

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed December 1, 1999.

An appeal from the Circuit Court for Okaloosa County. Judge Jack R. Heflin.

Robert Augustus Harper and Steven Brian Whittington of Robert Augustus Harper Law Firm, P.A., Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General and Bart Schneider, Assistant Attorney General, Office of the Attorney General, Tallahassee, for Appellee.

PADOVANO, J.

Patrick Smith, the defendant, appeals his convictions for first degree murder and armed robbery. We affirm. Of the four points raised on appeal, we find that only one merits discussion. The defendant contends that the trial court erred in admitting into evidence the pretrial statement of a codefendant. He argues that the statement was not a declaration against penal interest, as the trial court ruled, and that the admission of the statement deprived him of the right to confront the witnesses against him. We agree that the trial court erred in admitting the codefendant's statement in evidence, but we conclude that the error was harmless beyond a reasonable doubt. Therefore, we affirm.

The state did not seek the death penalty on the murder charge and ultimately agreed that the evidence against the defendant was insufficient to support a finding of premeditation. However, the state argued that the defendant was guilty of first degree murder, because he participated in the

armed robbery that led to the victim's death. The trial consisted of a series of witnesses who testified to the same event but gave differing versions of the defendant's participation.

Sean Bradley, the victim of the robbery, lived in a mobile home in Niceville with his fiancé, Nicole Darnell, and their friend David Lawrence, the victim of the homicide. Bradley was unemployed and supported himself by selling marijuana. He testified that a young Asian man, later identified as Harry Tipton, came to his home on December 3, 1996, and asked if he had any marijuana for sale. Three other young men entered the residence along with Tipton. Bradley could give only a general description of these men, but they were all identified by other witnesses. According to Bradley, one of the men was a heavier set Asian (Robert Wolf), one was a shorter Asian (Chris Kerr), and one was an African American (the defendant). In response to Tipton's inquiry, Bradley produced three quarter-ounce bags of marijuana and placed them on the

coffee table in the living room.

The men were inspecting the marijuana when, according to Bradley, the African- American man stood up and pulled out a gun, pointed it at Bradley's head and said, "We're going to take your shit." Bradley put his hands in the air and said, "Fine, take it." David Lawrence had been sleeping in another room but he woke up and was walking down the hallway toward the living room just as the men were about to take the marijuana. As Lawrence approached, one of the men said, "What are you doing? We'll shoot you," or words to that effect. Lawrence responded, "If you're going to shoot me, shoot me." At that point Bradley heard the sound of a gunshot, and Lawrence fell to the floor.

Bradley did not see who fired the gun. He explained that when the shot was fired, he was looking out the window to see if Nicole was coming home from school. When he turned around, however, he saw Harry Tipton holding the gun. Tipton

then pointed the gun at Bradley, who curled up in a ball. The men left, and Bradley got up and locked the door. He noticed that the marijuana he had placed on the coffee table was gone. Bradley called 911, but Lawrence died of the gunshot wound despite the efforts of the emergency technicians.

Several days later, Investigators Mark Young and Larry Ashley of the Okaloosa County Sheriff's Department questioned the defendant. They advised the defendant of his rights, and he signed a waiver indicating that he would make a statement. At first, the defendant told the investigators that he had never seen the gun until the day of the shooting. He said that on that day, Harry Tipton, Rob Wolf, and Chris Kerr came to his house and picked him up in Tipton's car. They were all going out to buy some marijuana. While the men were in Bradley's home negotiating the purchase of the marijuana, Tipton pulled out a gun, and three seconds later a shot went off.

The investigators then told the defendant that Bradley

had said that it was the African-American man who had held the gun on him. At that point, the defendant revised his statement. He then said that Tipton had handed him a pistol from under the car seat and told him to carry it into the mobile home and to pull it out when they saw the marijuana. Tipton also told him that the gun was necessary, because the people inside might be armed. The defendant tucked the pistol into his waistband and later pulled it out and pointed it at Bradley as instructed. The defendant attempted to chamber a round but he did not know how to operate the pistol. Tipton then took the pistol from the defendant. When Lawrence came out from the bedroom, Tipton shot him. At that point, Robert Wolf grabbed the marijuana, and they all ran out of the house.

After the defendant's two narrative accounts of the incident, the investigators asked him whether either Sean Bradley or David Lawrence had a gun. Investigator Young testified that the defendant then said Bradley had a gun and that

he was going for it when the defendant pulled out Tipton's pistol. Investigator Ashley then asked the defendant if he could record the interview. The defendant agreed, and the investigators made a tape recording, which the state later used in evidence at trial.

Robert Wolf entered a plea of no contest to manslaughter and agreed to testify for the state. The essence of his testimony was that the defendant knew about the plan to commit a robbery and that the defendant actively participated in the robbery. Wolf said that he, Tipton, and Kerr were talking about "hitting a couple of licks," which meant robbing a couple of drug dealers. They went to the defendant's house and discussed the plan with him, and then the defendant joined them in Tipton's car. Wolf testified that Tipton gave the defendant a gun and the defendant pulled the gun on Bradley and demanded the marijuana. When Tipton shot Lawrence, Wolf grabbed the marijuana, and all four men ran to the car and went

back to Tipton's house. According to Wolf, they split up at that time but met again later and smoked the marijuana. When they heard that Lawrence had died, they all went to the Cinco Bayou, and Wolf tossed the gun into the water.

A dive team located the gun and retrieved it from the Bayou. At trial, the state called a firearms expert who testified that a shell casing found in Bradley's mobile home was ejected from the gun that had been retrieved by the dive team. The investigators searched Bradley's home after the homicide but they testified that they did not find another gun. Nicole Darnell testified that she had never known Bradley to keep a gun in the house.

The state called Harry Tipton as a witness out of the presence of the jury, but Tipton refused to testify. When asked if he was prepared to answer questions about the offenses, Tipton said, "No sir. I can't honestly say I'd tell the truth. I feel that if I did testify, I'd perjure myself, sir." The trial judge

then instructed Tipton that if he did not agree to testify he could be held in contempt, but again Tipton declined. The jury did not hear any part of this testimony. Tipton's refusal to testify would later be used as a predicate for the admission of his pretrial statement.

The defendant took the witness stand in his own defense and testified that his initial discussion with Tipton was not about a robbery, but rather about a plan to purchase some marijuana to celebrate Tipton's birthday. When the four men arrived at Bradley's mobile home, Tipton reached under the seat, pulled out a gun, and told the defendant to hold the gun in case the people inside tried to rob them. According to the defendant, Tipton said the gun was not loaded and that it was just for show. The defendant agreed to hold the gun, and he stuck it in his waistband and went inside with Tipton.

While the men were engaged in a preliminary discussion about the marijuana, Tipton said "He's got a gun," referring to

Bradley. The defendant said that he saw Bradley reaching for the gun, so he pulled out the gun Tipton had given him. At that point, Bradley put his hands up, and the defendant told him to "drop the weed." The defendant explained that he told Bradley to drop the marijuana, because he was afraid Bradley would throw it at him, get his gun, and shoot him.

Tipton then told the defendant that he had to cock the gun, but the defendant did not know how. The defendant said that he had never used a gun before. Tipton grabbed the gun from the defendant and at that point David Lawrence walked out of his room, and Tipton pointed the gun at Lawrence. Lawrence said something like "Shoot me," and the gun discharged. The defendant ran out of the house and had no further contact with Tipton, Wolf, or Kerr. He denied smoking any of the marijuana and claimed that he did not even know it had been taken until the police told him. He also denied being present when the gun was thrown into the Cinco Bayou.

On rebuttal, the state sought to introduce an edited version of Harry Tipton's pretrial statement to Sheriff's investigators. In the original tape recording, Tipton said that all four men were involved in planning the robbery. The edited version was the same in all respects, except that all references to the defendant were deleted. The prosecutor argued that Tipton's statement was relevant to rebut the defendant's trial testimony, because it was unreasonable to assume that three men planning a robbery would give the gun to another person who was not aware of the plan.

Defense counsel objected on the ground that Tipton's pretrial statement was hearsay. In response, the state argued that the statement was admissible as a declaration against penal interest. Furthermore, the prosecutor argued that the admission of the edited tape recording would not violate the defendant's right to confront the witnesses against him, because all references to the defendant had been deleted. The trial court

agreed with the state and ruled that the statement was admissible in evidence.

After the trial court's ruling on the admissibility of the statement, the prosecutor asked whether the defense wanted the court to inform the jury that the tape had been edited, to explain why it was so short and why it had several gaps in it. Defense counsel stated that he would be satisfied if the court were to advise the jury that the tape was a redacted tape and had been edited to take out any reference to anyone other than Harry Tipton. The prosecutor pointed out that such an instruction would be inaccurate, because the tape mentioned Wolf and Kerr and that the only person who was not mentioned was the defendant. Defense counsel responded, "Your Honor, that is more accurate."

Before the taped statement was played for the jury, the court gave the following instruction:

> Ladies and gentlemen, as you gleaned from the testimony of Investigator Young, you're getting

> ready to hear a tape of a statement made by Harry Tipton, and as you've learned, it's what Mr. Elmore and Investigator Young call a redacted tape. That means it's been sanitized. There are parts of it that are gone. There are gaps in there. It'll sound to you as an incomplete – it's very short, and it's incomplete, but the portions that you will hear are true and correct and accurate as to those portions actually played. You'll hear Mr. Tipton speaking and making his statement. You'll hear references to persons that you already heard about, persons by the name of Kerr and Wolf. So the version that you hear is going to only relate to three of the four participants, Tipton, Kerr and Wolf. The gaps involve other people. Can I make that any clearer?

The prosecutor then stated, "Judge, only that all references to Patrick Smith have been removed." The judge then instructed the jury, "Those are the cause of the gaps. Do you understand that? Those are matters in which Mr. Smith's name is mentioned, and we're keeping his name out from your hearing." The court then asked defense counsel, "Mr. Flowers, can I make it any more clear?" Defense counsel responded, "No, Your Honor."

Harry Tipton's taped statement was then played for the jury. On the tape, Investigator Ashley asked Tipton to give his account of the homicide and robbery. Tipton's entire statement, as played for the jury, was as follows:

> Yes. I met some people a couple months ago, I believe, and my friends went up there and bought, like, a half ounce off of him. I met them at this time. I went there once after that to get a sack, and they didn't have none, and he remembered me, and I just left and didn't think nothing of it, and the morning of the shooting, Tuesday morning, a friend, Chris Kerr, came over and woke me up. He came in, and we just fell back asleep. We woke up around 11:00, 11:30, something like that, because another friend of mine, Robert Wolf, came over, and he said, it's payday. He wanted to go jack somebody, and me and Chris, you know, we didn't have much money or anything on us, so, being stupid, we did it, too. We drove around for a while, we talked about it. Rode out there to Niceville. We were up in there, and he showed us the weed, and I pulled out some money, and then his roommate walked out, looked like he just woke up, like mad or something, and he's like – I pointed the gun at him and told him to sit down, and he's like, you're going to have to shoot me, and then I just kept the gun pointed on him, and he walked at me at a fast pace, and as soon as the – he

> bumped into the gun. It just went off, and I didn't know what to do really. I just looked down. He was still alive. He was on the ground, and then I saw blood just started coming out. I got scared.

The jury found the defendant guilty of first degree murder and robbery with a firearm. He was sentenced to a term of life on the murder charge and a concurrent term of nineteen years and two months on the armed robbery charge. The defendant then filed a timely direct appeal to this court.

We conclude that Tipton's extrajudicial statement to the investigators was hearsay and that it should not have been admitted in evidence against the defendant. Section 90.804(2)(c), Florida Statutes, creates an exception to the hearsay rule for statements against penal interest, but Tipton's statement does not meet the requirements for the use of this exception. A party who offers to introduce a statement on the ground that it is a declaration against penal interest must show: (1) the declarant is unavailable as a witness, (2) the statement

so far tends to subject the declarant to criminal liability that a reasonable person in the same position would not have made the statement unless he or she believed it to be true, and (3) the statement is corroborated by circumstances that clearly indicate its trustworthiness. See Maugeri v. State, 460 So. 2d 975 (Fla. 3d DCA 1984) (adopting the test in United States v. Riley, 657 F.2d 1377 (8th Cir.1981)). In the present case, the state showed that Tipton was unavailable but failed to establish that a reasonable person would have believed his statement to be true or that his statement was trustworthy.

In determining whether a reasonable person would have believed the declarant's statement to be true, we must consider the circumstances existing at the time the statement was made, as well as the content of the statement. Section 90.804(2)(c), Florida Statutes allows the admission of a hearsay statement only if the statement was contrary to the declarant's interest "at the time of its making." The theory underlying this exception

to the hearsay rule is that people are not likely to make statements harmful to their own interest unless they have good reason to believe those statements are true. See Charles W. Ehrhardt, Florida Evidence § 804.4 (1999 ed.). It follows that the person making the statement must have understood the potential harm at the time the statement was made. See John W. Strong, McCormick on Evidence § 319(a) (5th ed.1999). A statement does not qualify as a declaration against penal interest merely because it later proves to be harmful.

Whether Tipton understood that his statement was a confession to murder is not clear. He admitted that he was guilty of the robbery, but it appears from his statement that he was trying to absolve himself of criminal responsibility for the murder. When he spoke of the murder, he said that "[Lawrence] bumped into the gun. It just went off, and I didn't know what to do really." As a matter of law, Tipton's confession to the robbery was a confession to the murder, as

well, but he would not have known that unless he understood the operation of the felony murder rule at the time he spoke with the investigators. He may have been unaware of the felony murder rule. If so, he would not be the first defendant who unwittingly confessed to murder thinking that he was admitting only a less serious offense. The record does not disclose any fact or circumstance to suggest that Tipton understood the potential harm he caused to himself by making the statement. Consequently, we cannot say with any confidence that a reasonable person in his position would have thought that the statement was true.

The applicability of the exception for a statement against penal interest also depends on the content of the incriminating declaration. Section 90.804(2)(c) uses the term "statement" in a narrow sense to refer to a specific declaration or remark incriminating the speaker and not more broadly to refer to the entire narrative portion of the speaker's confession. See

Williamson v. United States, 512 U.S. 594 (1994) (interpreting the same language in rule 804(b)(3) of the Federal Rules of Evidence). If a part of what the declarant has said is exculpatory, the statement is not entirely self-inculpatory, and it is not therefore admissible under the statement against penal interest exception. An attempt to minimize criminal liability removes the sole justification for allowing the declarant's statement in evidence. Likewise, a statement against penal interest may not be truly self-inculpatory if the declarant has implicated a third party in the process of making his own admission. See Williamson, 512 U.S. at 601. Here again, an attempt to shift the blame to another, even in part, undermines the very foundation of the exception.

In the statement at issue here, Tipton not only incriminated himself, but he also incriminated his codefendants Wolf and Kerr. To that extent, his statement was not truly self-inculpatory. Moreover, Tipton's statement contains both

inculpatory and exculpatory parts. He appears to have admitted the robbery to make his exculpatory statement about the murder more credible. As the Supreme Court noted in Williamson, "One of the most effective ways to lie is to mix falsehood with the truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." 512 U.S. at 599-600. On the facts of this case we are unable to conclude that a reasonable person would have thought that Tipton's entire statement was true.

Nor did the state show that the statement was corroborated by circumstances that clearly indicate its trustworthiness. See Maugeri, 460 So. 2d 975. In fact, the circumstances point to a contrary conclusion. Tipton was a suspect in police custody at the time the statement was made. Although a custodial statement made by a suspect is not necessarily untrustworthy, the courts should exercise great caution when admitting such a statement as a declaration

against penal interest. As the United States Supreme Court observed in Lee v. Illinois, 476 U.S. 530, 541 (1986), "the arrest statements of a codefendant have traditionally been viewed with special suspicion." The courts have good reason to be suspicious of a statement made by a person in police custody, because "the statement or parts of it implicating others very likely were made to curry favor even if it also inculpates the declarant." John W. Strong, McCormick on Evidence § 319(d) (5th ed.1999).

These fears are shown to be well founded in the present case. When Tipton took the witness stand during the state's proffer, he told the trial judge, "I can't honestly say I'd tell the truth. I feel that if I did testify, I'd perjure myself, sir." Despite this warning, the prosecutor pressed the trial court to admit the statement Tipton had made earlier to the Sheriff's investigators. To justify the use of the statement as a declaration against penal interest, the state would have had to present some evidence that

it was trustworthy; yet the circumstances clearly suggest that the statement might not have been true. If Tipton would have lied under oath in court as he conceded, he might also have lied to the police.

On a point closely related to our hearsay analysis, we also conclude that the admission of Tipton's statement violated the defendant's constitutional rights under the Confrontation Clause of the Sixth Amendment. Although state hearsay rules protect similar values, see California v. Green, 399 U.S. 149, 155 (1970), the United States Supreme Court has been careful not to equate a hearsay violation with a Confrontation Clause violation. See White v. Illinois, 502 U.S. 346 (1992).

The protection afforded by the Confrontation Clause includes the right to cross-examine witnesses. See Pointer v. Texas, 380 U.S. 400 (1965). This right is often asserted as a reason for excluding an extrajudicial statement by a codefendant. See, e.g., Douglas v. Alabama, 380 U.S. 415

(1965). If the codefendant is not available for cross-examination, the defendant has no effective means of challenging the statement. In the leading case of Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court held that the harm caused by the admission of a codefendant's statement incriminating the accused cannot be cured by a limiting instruction.

It is possible to avoid a Bruton violation by redacting from the codefendant's statement all references to the defendant on trial. Such a statement may be admissible if the facts related by the codefendant serve as a link to other evidence against the accused. See Richardson v. Marsh, 481 U.S. 200 (1987). However, the redaction of the defendant's name from a codefendant's confession will not cure a Bruton problem if the jury could infer that the codefendant incriminated the defendant in the original version of the statement. As the Supreme Court explained,

> redactions that replace a proper name with an obvious blank, the word "delete," a symbol, or similarly notify the jury that a name has been deleted are similar enough to Bruton's unredacted confessions as to warrant the same legal results.

Gray v. Maryland, 523 U.S. 185, 195 (1998). We recently applied the rule in Gray to a case in which a statement made to a policeman created an immediate inference that the declarant had incriminated the defendant on trial. See Jones v. State, 739 So. 2d 1220 (Fla. 1st DCA 1999).

In the present case, the redaction did not cure the Bruton violation, because it was obvious that the passage deleted from the tape recording was an incriminating reference to the defendant. If the jurors had any doubt about that, it was removed by the trial court's instruction. The trial judge told the jury that Tipton's statement had been "sanitized" and that"[t]here are parts of it that are gone." He said that the version of the statement the jurors were about to hear would relate only to "three of the four participants, Tipton, Kerr and

Wolf," and then explained "The gaps involve other people. Can I make that any clearer?" Apparently not satisfied with the implication, the prosecutor responded, "Judge, only that all references to Patrick Smith have been removed." The judge then instructed the jury, "Those are the cause of the gaps. Do you understand that? Those are matters in which Mr. Smith's name is mentioned, and we're keeping his name out from your hearing." Under these circumstances, we think that any juror would have understood that Tipton had incriminated the defendant. Here, as in Gray, the omission of the defendant's name from Tipton's statement did not cure the Bruton violation.

We recognize that there are circumstances in which a statement by a nontestifying codefendant can be admitted as evidence without violating the confrontation clause. The United States Supreme Court held in Idaho v. Wright, 497 U.S. 805 (1990) that a hearsay statement may be admissible under the Confrontation Clause if the statement has sufficient indicia

of reliability. The Court explained that this requirement can be satisfied by showing that the statement falls within a firmly rooted exception to the hearsay rule, or by showing that the statement has particularized guarantees of trustworthiness. In making this determination, the trial court may consider only the circumstances surrounding the making of the statement and those that bear on the credibility of the declarant. See Wright, 497 U.S. at 819.

Applying these principles, we conclude that Tipton's statement is not supported by sufficient indicia of reliability. The statement was offered into evidence as a declaration against penal interest, but as the Florida Supreme Court held in Franqui v. State, 699 So. 2d 1312, 1319 (Fla. 1997), the declaration against penal interest exception in section 90.804(2)(c) is not a "firmly rooted" exception to the hearsay rule. Consequently, we could eliminate the statement against penal interest exception as a method of establishing the reliability requirement

set out in Wright even in a case in which the exception applied. A statement against penal interest, though admissible under the rules of evidence, may be subject to exclusion as a violation of the Confrontation Clause.

Nor is the reliability requirement of Wright satisfied in this case by the circumstances relating to the making of the statement or the credibility of the declarant. The statement was not a genuine confession of guilt of the kind that might be made to friend or relative. Rather, it was an equivocal statement to a law enforcement officer by a person who was in custody on a serious charge. As we have explained, a reasonable person would have good cause to question the reliability of the statement. Moreover, there is no evidence to suggest that the declarant was believable. To the contrary, the declarant conceded that he was willing to lie under oath to serve his own interests.

Although the admission of Tipton's statement violated

the Confrontation Clause of the Sixth Amendment, as well as section 90.804(2)(c) of the Florida Evidence Code, we are convinced beyond a reasonable doubt that the improper admission of the statement was harmless. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). An extrajudicial statement by a codefendant incriminating the defendant on trial is no longer admissible merely because it interlocks with the defendant's own statement, but it is still proper for an appellate court to consider the interlocking nature of the statements in determining harmless error. See Wright; Franqui. Here, the incriminating fact implied in Tipton's statement (that the defendant participated in the robbery) was directly established in the defendant's own statement. Additionally, the defendant's participation was established by another defendant, Robert Wolf, who testified at trial and was subject to cross-examination, and by forceful circumstantial evidence including Bradley's testimony that it was the African-American

man who forced him at gunpoint to give up the marijuana. For these reasons, we are confident that the error in admitting Tipton's statement had no effect on the outcome of the trial.

In summary, we conclude that Tipton's statement did not qualify as a statement against penal interest and that its admission violated the defendant's rights under the Confrontation Clause. Because Tipton's statement established no more than that which the defendant had conceded in his own statement to the investigators, its admission was harmless beyond a reasonable doubt.

Affirmed.

ERVIN and LAWRENCE, JJ., CONCUR.

28 United States Code § 2254. State custody; remedies in Federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted

the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to

cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the state cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act., in all proceedings brought under this section,

and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.